82-1132
No. 82-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOSE SALDANA,

Petitioner,

—v.—

ANTONIO GARZA and RICARDO OLVERA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented for Review

1. May the traditional common law defense of good faith and probable cause to an unlawful arrest recognized by this Court in Pierson v. Ray be expanded to arrests on less than probable cause?

2. May the persuasion burden on the issues raised by an assertion of a good faith defense to an action for damages for unlawful arrest be imposed on the plaintiff?

3. Are police officers who have effected an unlawful arrest on less than probable cause entitled to a qualified immunity from suit, or, merely, a good faith defense?

4. Should municipalities be liable for damages caused by the unconstitutional acts of their agents who are shielded from personal liability by a qualified immunity or a good faith defense?

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MISCELLANEOUS

The Parties

The parties to this proceeding are listed in the caption.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported at 684 F.2d 1159 (5th Cir. 1982) and is set forth in petitioner's appendix at pp. A-2 through A-32. The order of the District Court, dated Feb. 10, 1981, dismissing petitioner's complaint and the order of the Fifth Circuit, dated October 6, 1982, denying rehearing en banc are unreported and are set forth in petitioner's appendix at pp. A-1 and A-33, respectively.

JURISDICTION

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1) to review an order of the Court of Appeals entered October 6, 1982, which denied rehearing of a decision and order entered on September 7, 1982.

STATUTES INVOLVED

42 United States Code § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

Texas Penal Code:

Sec. 42.01 Disorderly Conduct

(a) A person commits an offense if he intentionally or knowingly:

(1) Uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;

Sec. 42.08 Public Intoxication

(a) An individual commits an offense if he appears in a public place under the influence of alcohol or any other substance, to the degree that he may endanger himself or another.

STATEMENT OF THE CASE

On Sunday, February 15, 1976, at approximately 10:00 p.m. petitioner, Jose Saldana, his father, and his future brother-in-law, Fernando Lopez, were listening to music in the front yard of Saldana's home in McAllen, Texas, when respondent, Antonio Garza (a seven-year veteran of the McAllen police force), approached and ordered them to lower the volume of their radio.[1] [Tr. p.237, lines 12-14]. Officer Garza conceded at trial that he had not received a single complaint concerning the radio and conceded that he did not believe that any law was being violated. [Tr. p.159, lines 20-22; p.167, lines 14-20]. Nevertheless, he testified that he "just felt like telling

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1. Citations [Tr. ___] are to the transcript of proceedings in the trial court.

them to" lower the music "because it was a little bit too loud". [Tr. p.160, lines 12-18; p. 166, lines 17-18; and p.237]. Petitioner's brother-in-law complied with Officer Garza's demand.[2] [Tr. pp.25-26; 78] A dispute arose, however, between petitioner and respondent over the propriety of respondent's conduct. Petitioner complained that respondent had no right to bother him in his own home. Respondent told petitioner to settle down or be arrested. When petitioner responded, "This is my goddamn property", Officer Garza arrested him for disorderly conduct by

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2. The radio was located in Fernando Lopez' automobile. Unfortunately, the Fifth Circuit below appears to have misread the record, suggesting that petitioner declined to comply with respondent's demand to lower the radio's volume. 684 F.2d at 1161. No suggestion has ever been made that petitioner refused to comply with Officer Garza's request to turn down the volume.

the use of abusive language[3] [Tr. p.189, lines 1-3], and subsequently charged him with public intoxication as well.

Officer Garza, an experienced police officer, conceded that he was aware that the abusive language ordinance pursuant to which he arrested petitioner required a danger of an immediate breach of the peace. Tex. Pen. Code, 42.01(a)(1). Respondents conceded that neither police officer felt provoked by petitioner's language and that no imminent breach of the peace was threatened by it. [Tr. pp.196-198 and 303-304]. Despite the obvious lack of probable cause to believe that the abusive language ordinance had been violated, respondents nevertheless arrested petitioner for alleged abusive language.

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3. Officer Garza's partner, Ricardo Olvera, a respondent herein, testified that petitioner
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In addition, respondents charged petitioner with public intoxication, despite the fact that the incident took place in petitioner's own front yard.[4] [Tr. pp. 241, lines 5-8] According to Officer Garza, he arrested petitioner for public intoxication because he appeared drunk and had been drinking beer, although Officer Garza conceded that

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also stated:

> "You damn so and so's or SOB's, why are you bothering poor people?" [Court translation].

Olvera would have translated petitioner's statement as follows:

> "You dogs, the only reason you are here is to take money away from poor people" or "You stingy dogs". [Tr. 293, lines 3-4, 8-10].

Olvera did not mention the additional statements in his arrest report, which referred solely to petitioner's "goddamn property" statement. [Tr. p.304-306; 311, 312].

4. A dispute exists over whether the incident took place well inside petitioner's front yard or on the border
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petitioner's anger resulted from the police intrusion rather than from intoxication. [Tr. p. 177, lines 16-25]. Officer Garza conceded that petitioner was neither about to buy more beer nor about to fall down. [Tr. p.189 lines 2-12; p.185, line 6; p.186, line 15]. Significantly, Officer Garza never subjected petitioner to any sobriety test before or after arrest. [Tr. pp. 169-170; 171, lines 15-17; p.249, lines 15-18]. Thus, as with the arrest for abusive language, the arrest for public intoxication appears to have lacked probable cause and been triggered, not

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between his front yard and the eight-foot shoulder which separates petitioner's front yard from the street. Texas law requires that a public intoxication offense take place "in a public place". Tex. Pen. Code § 42.08

by legitimate law enforcement concerns, but by petitioner's challenge to respondent's authority. Petitioner was subsequently acquitted of all charges. [Tr. pp.88-90, 147].

Shortly after his arrest, petitioner along with other named plaintiffs, commenced a class action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) alleging that named members of the McAllen police department had engaged in a pattern and practice of police abuse. Guadalupe Cano. et al. v. Jesse Colbath, et al. C.A. No. 76-B-52 (S.D. Tex., Brownsville Div.). In 1980, the District Court severed the individual damage claims from the class claims. The class claims were ultimately resolved pursuant to a settlement entered March 17, 1981.[5]

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5. The class action defendants have unsuccessfully asserted that the class action precludes individual damage claims.

At the close of evidence, petitioner requested a directed verdict on the ground that, as a matter of law, no probable cause existed to have arrested him for abusive language or public intoxication and that respondents had not established a triable issue of fact on the existence of a good faith defense. The District Court ruled that insufficient evidence of respondent Olvera's participation in the arrest existed to warrant submission to the jury[6], which returned a verdict for respondent Garza.

On appeal, a panel of the Fifth Circuit affirmed, holding that its prior decisions, when coupled with the reasoning of this Court's decision in Harlow v.

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6. Respondent Olvera's participation consisted chiefly of physically restraining petitioner while respondent Garza effected the arrest. [Tr. pp.245 and 296, lines 8-10].

Fitzgerald, ___U.S.___, 73 L.Ed. 2d 396 (1982), imposed the persuasion burden on the existence of a good faith defense to a § 1983 action for arrest without probable cause on the victim of the arrest rather than on the arresting officer.[7] Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982). This Court has twice reserved the issue of the allocation of the persuasion burden on the good faith defense to a § 1983 action. Gomez v. Toledo, 446 U.S. 635, 642 (1980) (Rehnquist, J., concurring); Harlow v. Fitzgerald, ___U.S.___, 73 L.Ed. 2d 396, 408 n.24 (1982). To the extent that this Court has spoken on the issue, it has implied that the persuasion burden rests with the defendant Dennis v. Sparks, 449 U.S. 24, 29 (1980).

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7. The Fifth Circuit noted that the arrest at issue herein might well have lacked any vestige of probable cause. However, given the allocation of the persuasion burden to plaintiff on the existence of a good faith defense, the jury's verdict exonerating respondent was affirmed. If, on
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After a timely petition for rehearing en banc was denied on October 6, 1982, (a copy of the order denying rehearing en banc is reproduced in the appendix at A-33) this petition for a writ of certiorari was filed.

REASONS FOR GRANTING THE WRIT

The task of assuring that police officials do not abuse the monopoly of force bestowed upon them by the community, while simultaneously encouraging legitimate and effective law enforcement, is among the most difficult -- and most important -- challenges confronted by a free society. The delicate mechanism which we have evolved requires a police official to demonstrate the existence of probable cause to believe an offense has been committed before invoking the power of arrest. Ordinarily, the decision as to whether probable cause to arrest exists is vested, not in

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the other hand, respondent bears the persuasion burden on the issue of a good faith defense, a new trial must be held. 684 F. 2d at 1162, 1164-1165 and 1166.

the police, but in an independent magistrate who must issue an arrest warrant. Where, however, an offense is committed in the presence of a police officer and it is impracticable to seek a warrant, common sense dictates that the police officer be vested with responsibility to determine for him or herself whether probable cause to arrest exists. When a police officer, vested with such discretion, effects a warrantless arrest without probable cause, he or she violates fundamental constitutional protections, giving rise to an action for damages under Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) and 42 U.S.C. § 1983. See also Monroe v. Pape, 365 U.S. 167 (1961); Pierson v. Ray, 386 U.S. 547 (1967); Reeves v. City of Jackson, 608 F.2d 644, 650-51 (5th Cir. 1979).

This Court has recognized that police officers might be reluctant to engage in legitimate law enforcement activity if they were absolutely liable for guessing wrong as to whether an individual to be arrested was guilty of a crime. Accordingly in Pierson v. Ray, 386 U.S. 547 (1967), the Court recognized the persistence under § 1983 of the common law "defense of good faith and probable cause," 386 U.S. at 557 (emphasis added), which exonerates police for effecting an arrest made in good faith and with probable cause. The first issue in this case is whether the Fifth Circuit erred in departing from both the clear language and holding in Pierson and the common law rule implicitly adopted by the Congress which enacted § 1983, when it ruled that police officers could establish a good faith defense even absent probable cause.

If the Court agrees with the Fifth Circuit and expands the good faith defense beyond Pierson and the traditional common law rule to encompass arrests on less than probable cause, then the case presents a second significant issue: Who has the burden of persuasion on the issues posed by assertion of the good faith defense once a defendant satisfies the burden of pleading the defense imposed by Gomez v. Toledo?

I. THE PANEL'S EXPANSION OF THE GOOD FAITH DEFENSE TO APPLY EVEN WHERE POLICE DEFENDANTS LACKED PROBABLE CAUSE CONFLICTS WITH PIERSON V. RAY

A writ of certiorari is necessary, first, to cabin the Fifth Circuit's drastic expansion of the common law defense of "good faith and probable cause" defined in Pierson v. Ray into a new defense of "good faith or probable cause."

The scope of the defense outlined in Pierson could hardly be clearer: the Court repeatedly used the phrase "good faith and probable cause", see, e.g., 386 U.S. at 555, 556, 557. When it explained the defense in Scheuer v. Rhodes, and afforded high-ranking executive officers a substantially broader protection by way of qualified immunity (see Point IIIB, infra), the Court stressed:

> When a court evaluates police conduct relating to an arrest its guideline is "good faith and probable cause." Ibid

416 U.S. at 245-46, citing Pierson v. Ray. The Court has never, so far as we are aware, referred to an alternative defense of good faith or probable cause.

Although the court below, and some other lower courts, have misread Pierson and Scheuer and exonerated police defendants in § 1983 Fourth Amendment actions even when they lacked probable cause,[9/] the reasoning of Pierson makes clear that the defense outlined in Pierson generally requires probable cause.[10/] The

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9/ See, e.g., Bivens v. Six Unknown Agents, 456 F.2d 1339, 1347-48 (2nd Cir. 1972), on remand from 403 U.S. 388 (1971). Most of the errors in understanding the Pierson good-faith defense stem from the Second Circuit's erroneous interpretation in Bivens.

10/ The Pierson Court noted that the defense was probably available also where a police officer acted "under a statute that he reasonably believed to be valid but that was later held to be unconstitutional ... " 386 U.S. at 555. Under more recent authority, no liability in that case would exist not because of any defense, (footnote continued on following page)

Court did not purport to be creating any new defense out of whole cloth, and such an attempt would have been inconsistent with its duty to enforce § 1983 as enacted by Congress. Accordingly, the "good faith and probable cause" defense was held to be simply the defense as it existed at common law, which Congress was held not to have "abolished" when it enacted § 1983. 386 U.S. at 554. As all of the authorities relied on in Pierson to define the scope of the common law defense make clear, probable cause was an indispensible requirement to establishing the defense. See, e.g., Missouri v. Fidelity & Deposit Co., 179 F.2d 327, 330-32 (8th Cir. 1950), cited at 386 U.S. at 295. Indeed, that had been the common law rule dating back to Entick v. Carrington, where

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but because probable cause would be said to exist. Michigan v. DeFillippo, 443 U.S. 31 (1979).

an award of £ 300 was upheld by Lord Camden because there had been no probable cause for the general search undertaken.[11/]

Affording the defense, as the Fifth Circuit has, even where probable cause is absent is not necessary to further the purposes of the defense. As Circuit Judge Jon O. Newman has noted in a penetrating analysis, when Fourth Amendment violations are at issue, police already have the benefit of an objective reasonableness standard: they cannot be liable in any event unless their actions were unreasonable. See Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 460 (1978). It makes no sense to ask whether an officer could reasonably believe that his action

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11/ See Lasson, The History and Development of the Fourth Amendment to the United States Constitution, at 47-48 (1937 ed.)

was reasonable, when in fact it was objectively unreasonable. Accordingly, as Judge Newman observed, probable cause is an indispensible element in the good faith defense, and courts which have misread Pierson to eliminate that requirement are in error. Id.

II. THE ATTEMPT BY THE PANEL BELOW TO SHIFT THE PERSUASION BURDEN TO THE PLAINTIFF ON THE GOOD FAITH DEFENSE CONFLICTS WITH THE SETTLED PRACTICE OF EVERY OTHER CIRCUIT.

Prior to the decision of the panel of the Fifth Circuit below, virtually every Federal court to have passed upon the issue, including various Fifth Circuit panels, had applied the traditional rule, reflected in Rule 8(c) of the Federal Rules of Civil Procedure, that the persuasion burden on an affirmative good faith defense must be borne by the defendant. E.g., DeVasto v. Faherty, 658 F.2d 859, 865 (1st Cir. 1981); Bivens v. Six Unknown Agents, 456 F.2d 1339 (2d Cir. 1972) (on remand); Cruz v. Beto, 603 F.2d 1178, 1184 (5th Cir. 1979); Barker v. Norman, 651 F.2d 1107, 1120 (5th Cir. 1981); Williams v. Treen, 671 F.2d

892, 897 (5th Cir. 1982); Haislah v. Walton, 676 F.2d 208, 214-215 (6th Cir. 1982); Wolfel v. Sanborn, 666 F.2d 1005, 1007 (6th Cir. 1982); Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir.), cert. denied, 439 U.S. 912 (1978); Harris v. Rosenburg, 664 F.2d 1121, 1128 (9th Cir. 1981); Martin v. Duffie 463 F.2d 464, 468 (10th Cir. 1972). The panel of the Fifth Circuit below candidly acknowledged that its decision to place the persuasion burden on the good faith defense on the plaintiff was at variance with the settled practice of every other Circuit. 684 F.2d at 1163 n.14. The panel believed, however, that despite this Court's explicit reservation of the issue[8] and the wealth of contrary authority, it was

8. This Court has twice explicitly reserved the issue of the allocation of the persuasion burden on the issue of the good faith defense. Gomez v. Toledo, (Continued on following page)

bound by recent Fifth Circuit precedent placing the burden of persuasion on the issue on the plaintiff. Id. A writ of certiorari should issue to enable the Court to resolve this important conflict.

III. THE PANEL BELOW SERIOUSLY MISUNDERSTOOD THE COURT'S DECISION IN HARLOW v. FITZGERALD WHEN IT (1) IMPROPERLY ALLOCATED THE PERSUASION BURDEN ON THE AFFIRMATIVE GOOD FAITH DEFENSE TO THE PLAINTIFF AND (2) APPLIED A TEST OF QUALIFIED IMMUNITY APPLICABLE TO HIGH-RANKING OFFICIALS RATHER THAN THE GOOD FAITH DEFENSE APPLICABLE TO LOWER-RANKING EMPLOYEES SUCH AS POLICE OFFICERS.

A. The Burden of Persuasion Rests On The Defendants And They Plainly Failed To Carry It.

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446 U.S. 635, 642 (1980); Harlow v. Fitzgerald, ___ U.S. ___, 73 L.Ed. 2d 396 408 n.24 (1982). To the extent that this Court has spoken on the issue, it has implied that the persuasion burden must rest with the defendant. Dennis v. Sparks, 449 U.S. 24, 29 (1980) ("The burden is on the official claiming immunity to demonstrate the entitlement").

In Harlow, this Court modified the test for qualified immunity available to certain high ranking officials charged with policy making responsibility. The pre-Harlow test, established in Scheuer v. Rhodes, 416 U.S. 232 (1974) and Wood v. Strickland, 420 U.S. 308 (1975), had permitted an official to avoid liability for having violated the constitution by establishing, first, that he had reasonable grounds to believe that his action was lawful and, second, that he had acted in subjective good faith. Under such a test, a plaintiff could force a full trial on the merits by denying a defendant's protestation of good faith, even though reasonable grounds clearly existed for the defendant's mistaken belief that his actions were lawful. A majority of this Court held in Harlow that defendants asserting a

qualified immunity defense were entitled to prevail upon a showing that reasonable grounds existed for a belief -- albeit a mistaken one -- in the legality of their acts, without the necessity of demonstrating subjective good faith as well.

While Harlow modified the substantive content of the qualified immunity doctrine by relieving certain defendants from demonstrating subjective good faith, it did not purport to alter the burden of proof rules governing the "objective" determination of whether reasonable grounds existed for a mistaken belief in the legality of the defendant's acts. Indeed, the Court expressly reserved the issue. 73 L.Ed. 2d at 408 n.24.

Assuming arguendo that the Harlow test applies to the arrest of petitioner, it seems clear that Officer Garza had no reasonable basis for any belief that

probable cause existed to arrest petitioner in his own home for abusive language or public intoxication.[12] Thus, under Harlow, and Pierson v. Ray, supra, the District Court should have directed a verdict for petitioner. At a minimum, the case should

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12. As a matter of law, petitioner's words could not have justified his arrest. E.g., Gooding v. Wilson, 405 U.S. 519, 525 (1972); Lewis v. New Orleans, 415 U.S. 130 (1974). Thus, under precisely the "clearly established law" described by this Court in Harlow, Officer Garza could not reasonably have believed that probable cause existed to arrest petitioner under the abusive language statute. Tex. Pen. Code, § 42.01.

Similarly, Officer Garza flouted "clearly established law" when he arrested petitioner for public intoxication in his own front yard under a statute which plainly requires that the offense be committed "in a public place." Moreover, Officer Garza never offered any evidence tending to show that petitioner was a danger to himself or to others, as required by the Texas public intoxication statute. Tex. Pen. Code, § 42.08.

have been submitted to the jury pursuant to a charge which made it clear that the burden of persuasion on the question of whether a reasonable basis existed to believe that probable cause was present rested with the defendant. Harlow, therefore, provides no support whatever for the action of the panel of the Fifth Circuit below in shifting the persuasion burden to the plaintiff on the issue of "objective reasonableness" needed to establish a qualified immunity.[13]

B. Defendants were Entitled To Invoke Only The Good Faith Defense, Not Qualified Immunity.

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13. Even if one shifted the persuasion burden to the plaintiff on the existence of reasonable grounds to believe that probable cause existed, petitioner should have received a directed verdict on the issue, since there is no basis whatever to justify a finding of reasonable belief that probable cause existed.

More fundamentally, however, it is doubtful whether Harlow has any applicability to police abuse cases involving lower-ranking officials who have not traditionally been entitled to an immunity from suit, as opposed to a good faith defense. Indeed, the Court took pains in Scheuer v. Rhodes to emphasize that very distinction, which the Fifth Circuit has collapsed:

> When a court evaluates police conduct relating to an arrest its guideline is "good faith and probable cause"...in the case of higher officers of the executive branch, however, the inquiry is...

416 U.S. at 245-46. See also id. at 247-48.

The qualified immunity doctrine is designed to shield certain officials from judicial scrutiny in order to permit them to exercise policy-making functions free from the time-consuming and

potentially inhibitory duty of defending their judgments in court. In Harlow, this Court ruled that the time-consuming nature of the subjective prong of the then-existing test for qualified immunity was so onerous that it endangered the historical purpose of the immunity doctrine -- the shielding of certain officials from undue pre-occupation with explaining their actions in a judicial forum. Whatever the wisdom of such decision in the context of ranking Presidential aides, as in Harlow, or the Governor of a State, as in Scheuer, or the members of a school board, as in Wood, it has no application to allegations of police abuse by lower ranking members of a police force. Police officers have never been entitled to an immunity from judicial review -- qualified or

otherwise. No one has ever suggested that police officers should be excused from the "inconvenience" of fully explaining their activities in a court of law. Instead, they have been shielded from unfair liability for having effected an unlawful arrest, not by any doctrine of official immunity, but only by a good faith defense which requires either that a police officer have acted in good faith and with probable cause (see Point I, supra); or if Pierson has been expanded, that the police officer demonstrate reasonable grounds to found a good faith belief that probable cause existed. Unlike the immunity doctrine, which is designed to minimize judicial scrutiny over policy-making officials, the good faith defense is

designed to encourage painstaking judicial scrutiny of the conduct of ministerial personnel in order to determine whether to exonerate them from the consequences illegal activity. Thus, the determination in Harlow that time-consuming inquiry into the subjective mental state of a ranking official is inconsistent with the purpose of the immunity doctrine has little or no relevance to police abuse cases involving, not qualified immunity, but only the good faith defense.

In any event, whether the Harlow test is applied or whether it is deemed inapplicable to police abuse cases, Harlow provides no support for the panel's dramatic re-writing of the burden of proof rules in police abuse cases

and its consequent affirmance of the judgment in defendants' favor.[14]

The panel's decision removes any effective check on the use of retaliatory arrest to punish a person for challenging the propriety of a police officer's actions. If a person who has been unconstitutionally arrested must prove both that probable cause did not exist and that the police officer could not reasonably have believed that probable cause existed, the delicate mechanism which balances individual liberty against effective law enforcement will have been

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14. The cases cited by the Circuit to support its holding that defendants were entitled to the defense are all quite inapposite here. In all the cases cited by the Court of Appeals, there is either an intervening, insulating factor (a magistrate) protecting the official from liability, or substantial confusion as to the state of law at the time the aggrieved party was arrested.

seriously damaged. Given the extraordinary difficulty in satisfying such a persuasion burden, no effective deterrent to a retaliatory abuse of the arrest power would exist. On the other hand, requiring a defendant to establish at least a reasonable basis for a belief that probable cause existed places the persuasion burden on the party with access to the facts and properly deflects error in favor of the vindication and protection of constitutional rights.

IV. THIS COURT SHOULD EXTEND MUNICIPAL LIABILITY FOR DAMAGES TO THOSE WHOSE RIGHTS ARE VIOLATED BY OFFICIALS PROTECTED BY QUALIFIED IMMUNITY OR THE GOOD FAITH DEFENSE.

A principal policy consideration in the partial elimination of municipal immunity by Monell v. Department of

Social Services, 436 U.S. 658 (1978)[15], and the denial of a good faith defense to municipalities by Owen v. City of Independence, 445 U.S. 622 (1980), was to assure compensation to victims of civil rights violations. That public policy is defeated, however, in those situations where the Monell doctrine does not presently permit a cause of action against a municipal body whose employees have violated constitutional rights and a public official such as Garza is shielded by qualified immunity or a good faith defense. In addition, of course, the scope of immunity afforded

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15. 42 U.S.C. § 1983 was "intended to give a broad remedy for violations of federally protected rights." Monell, 436 U.S. at 685 (footnote omitted).

by Monell and the judgment below is in irreconciliable tension with the fundamental principle announced by Chief Justice Marshall in Marbury v. Madison, that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." 1 Cranch 137, 163 (1803) (emphasis added).[16]

To resolve such dilemmas, this Court should hold that municipalities are liable under 42 U.S.C. § 1983 for damages suffered by persons whose rights are violated by officials but who

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16. The Chief Justice continued

> In Great Britain the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court....The government

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are shielded from judgment by qualified immunity or a good faith defense. Otherwise, "many victims of...malfeasance would be left remediless." Owen v. Independence, 445 U.S. at 651.

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> of the United States has been emphatically termed a government of laws, not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. 1 Cr. at 163.

CONCLUSION

Wherefore, Petitioner prays that this Court issue a writ of certiorari to the Fifth Circuit Court of Appeals or, in the alternative, reverse the Court of Appeals summarily, on the ground that Petitioner is entitled to judgment as a matter of law.

Respectfully submitted,

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December 30, 1982

ORDER AND JUDGMENT OF DISTRICT COURT

This action came on for jury trial on September 29, 1980. The Plaintiff and Defendants all appeared in person and with their respective attorneys. After all evidence was presented, the jury heard the closing arguments of the attorneys and the instructions of the Court. Thereupon, on September 30, 1980, the jury announced in open court a unanimous verdict in response to special interrogatories. Based on that verdict, which is now on file, the Court renders the following judgment:

IT IS ORDERED that the Plaintiff, Jose Saldana, take nothing from the Defendants. The defendants, Antonio Garza and Ricardo Olvera, shall recover of the Plaintiff their costs of action.

DONE this 10th day of February, 1981, at Brownsville, Texas.

Filemon Vela (signed)
United States District Judge

Jose SALDANA
Plaintiff-Appellant

v.

Antonio GARZA and Ricardo Olvera
Defendants-Appellees.

No. 81-2111.

United States Court of Appeals
Fifth Circuit

Sept. 7, 1982

Before BROWN, GOLDBERG and POLITZ, Circuit Judges.

GOLDBERG, Circuit Judge:

The plaintiff-appellant brought this civil rights damage action against two police officers who allegedly subjected him to arrest and detention without probable cause. Following a trial in federal district court, a jury found that the plaintiff's arrest was based upon probable cause. Accordingly, judgment was entered in favor of the defendant police officers. The plaintiff then brought this appeal,

arguing that there had been numerous errors in the trial proceedings.

Our review of the record reveals that the defendant police officers asserted their "good-faith" as a bar to personal liability and that the plaintiff failed to rebut this affirmative defense. We therefore conclude that insofar as these defendants were cloaked by the special protections afforded by a qualified immunity, the judgment dismissing the plaintiff's claims must be affirmed.

I. FACTS

This appeal arises from events that transpired during the late evening hours of February 15, 1976 in the south Texas city of McAllen. That night, plaintiff-appellant Jose Saldana was standing near his home,[1] drinking beer and

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1. There is a dispute as to whether
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listening to a car stereo along with his father and his sister's fiance.

At approximately 11:00 p.m., police officers Antonio Garza and Ricardo Olvera were on routine patrol in the neighborhood, cruising in an area approximately one-and-a-half blocks from the Saldana property. Hearing loud music, shouting, and "gritos,"[2] the two officers followed the sounds in an effort to investigate.[3] At the end of this aural

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Saldana was standing in a "public place" at the time of this incident. Saldana contends that he was positioned in his own driveway, near a public street but on his property; the defendants contend that Saldana had stepped over his property line and into the street. See t. a. n. 9.

2. The parties tell us that a "grito" is best characterized as "an exuberant yelp."

3. Garza and Olvera were not responding to any specific complaints about the noise

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trail, Officers Garza and Olvera found the Saldana trio.

Officer Garza stepped out of the patrol car, approached the revelers, and attempted to read the McAllen noise ordinance to them. He then told the three to quiet down and lower their stereo. Saldana's response was hostile. Just what Saldana said to Officer Garza remains unclear,[4] but both police officers testified that Saldana was definitely

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but were attracted to the scene by the noise itself. Earlier that evening, however, there had been complaints about the noise and another team of McAllen police officers had asked the Saldana household to quiet down.

4. The verbal exchange between Saldana and Officer Garza was carried on in Spanish. Apparently, Officer Garza attempted a translation of the McAllen noise ordinance. In response, Saldana is reported to have told Garza to "get off my god-damn property," and called the officer a "stingy-dog," among other insults. We are told

(Continued on following page)

angry and appeared to be drunk as well.[5]

Officer Garza insisted that Saldana calm down, stop yelling and turn down his radio. When Saldana refused, Garza proceeded to place him under arrest. Saldana resisted and a brief struggle ensued, however he was quickly restrained and placed in the patrol car. Saldana was charged with "public intoxication" and "disorderly conduct by abusive language," held at the McAllen police station for about forty minutes, and then released.

(continued from previous page)

that the gist of Saldana's tirade was that Officer Garza, a Mexican-American, was working for a police force which Saldana perceived to be an arm of the "Anglo" establishment.

5. Officer Garza testified that Saldana appeared glassy eyed, unsteady on his feet, and smelled of alcohol. Trial Transcript at 175. Saldana admits to having had "four-or-five" beers. Trial Transcript at 118.

There has been no allegation that Officers Garza and Olvera knew Jose Saldana or harbored any personal animus toward him, nor has there been any suggestion that Saldana was in any way abused once he had been restrained and placed in the patrol car.

II. PROCEEDINGS BELOW

The procedural origins of this suit can be traced to a class action pending in the United States District Court for the Southern District of Texas: Guadalupe Cano, et al. v. Jesse Colbath, et al. (S.D.Tex., Brownsville Div., CA 76-B-52). In Cano v. Colbath, the plaintiffs alleged that the City of McAllen, its police chief, and certain individual police officers were responsibe for a pattern and practice of police misconduct. The plaintiffs sought injunctive

relief as well as monetary compensation for those McAllen residents who had allegedly suffered from specific instances of official wrongdoing.

On April 10, 1980, the district court ordered that the damage claims in Cano v. Colbath be severed from the class action and directed each of the individual claimants to file separate suits. Jose Saldana, appellant in the case now before us. was one of the individual claimants in Cano v. Colbath. Pursuant to the order severing his claim from the class action, Saldana filed this suit under 42 U.S.C. § 1983, seeking $60,000 in compensatory and punitive damages from Officer Garza and Olvera.

As the basis for his damage claims against Garza and Olvera, Saldana alleged that on the night of February 15, 1976,

he had been arrested and detained without probable cause and that the defendants had used unreasonable force in making the allegedly illegal arrest.[6] Specifically, Saldana argued that he was neither "publicly intoxicated"[7] nor "disturbing the peace"[8] when he was arrested.

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6. Per order of the district court, the parties did not file new complaints and answers in the individual damage actions. Instead, each side was directed to submit a proposed pretrial order supplementing the pleadings filed in Cano v. Colbath. Thus, our presentation of the plaintiff's allegations and the defendants' response is culled from the pleadings in Cano v. Colbath, as supplemented by the proposed pre-trial orders prepared by the parties in this case.

7. Under Texas law, "an individual commits an offense if he appears in a public place under the influence of alcohol or any other substance, to the degree that he may endanger himself or another." Tex.Penal Code Ann. tit. 9, § 42-08(a) (Vernon).

8. Under Texas law "a person commits an offense if he intentionally or knowingly:
(Continued on following page)

Saldana contended that he could not have been guilty of "public intoxication" as defined by Texas law because he was not so intoxicated as to pose an immediate threat to himself or to others and because he was not in a "public place" at the time of his arrest.[9] In a similar

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uses abusive, indecent, profane or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace [§ 42.01(a)1]"or makes unreasonable noise in a public place or in or near a private residence that he has no right to occupy [§ 42.01(a)5]." Tex.Penal Code Ann. tit 9, § 42.01 (Vernon). In Texas, a police officer is authorized to make a warrantless arrest for violation of § 42.01, Brown v. State, 594 S.W.2d 86, 87 (Tex.Cr.App.1980).

9. Armed with voluminous citations to Texas real property law and an array of maps, diagrams and visual aids, Saldana sought to establish that this arrest occurred while he was on private property; arguing that as a matter of law, a driveway intersecting a shoulder of a public road and adjacent to a neighboring home is not a "public place" for the purposes of the Texas Penal Code.

vein, Saldana argued that his angry words with Officer Garza could not constitute a violation of the Texas "abusive language" statute because he was not in a public place at the time of his arrest and because his utterances did not "tend to incite an immediate breach of the peace." In essence, the plaintiff litigated this civil damage suit much as if he were defending himself in a criminal action, arguing that he was not breaking the law when he was arrested and that therefore his arrest was not supported by probable cause.

In response, Officers Garza and Olvera denied Saldana's allegations, asserted that they did have probable cause to arrest, and that they did not use unreasonable force. Moreover, the defendants affirmatively claimed that they had acted "in good faith, and with

a reasonable belief in the lawfulness of their acts."[10]

A three day jury trial was held. Following the close of all testimony and arguments, the court directed a verdict in favor of Officer Olvera but allowed the jury to consider the evidence against Officer Garza. The jury

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10. In their answers and proposed pretrial order, the defendants affirmatively claimed that their reasonable good faith belief in the lawfulness of their conduct served as a bar to liability. See, "Defendants' Proposed Pretrial Order" (filed July 3, 1980) at page 2 in Saldana v. Garza (S.D.Tex., Brownsville Div., C.A. B-80-77); see also, "Original Answer of Defendant, Ricardo T. Olvera to Plaintiff's Complaint" (filed May 5, 1980) at ¶ XIV and "First Amended Answer of Defendant Antonio Garza to Plaintiff's Complaint" (filed March 17, 1980) at ¶ XIII in Cano v. Colbath, supra.

was charged, given special interrogatories, and returned a finding that the arrest was supported by probable cause and that Garza had not used unreasonable force. Judgment was entered upon the verdict and the plaintiff then brought this appeal.

III. ISSUES ON APPEAL

Appellant Saldana has advanced an array of interesting and not wholly insubstantial arguments on appeal; he contends that the trial court erred in its evidentiary rulings, in refusing to direct a verdict in his favor, in directing a verdict in favor of Officer Olvera, in its jury instructions, in its formulation of special interrogatories, and in allowing the jury to consider the police officers' "good-faith"

immunity defense.[11] However, we find that it is only necessary to address the last of these many issues: the question of the defendants' entitlement to a "good-faith" qualified immunity defense.

IV. THE QUALIFIED IMMUNITY DEFENSE

[1-3] It is axiomatic that public officials whose positions entail the exercise of discretion enjoy the special protections of a qualified immunity

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11. Apparently, Saldana does not appeal from the jury's finding that Officer Garza used reasonable force in effecting the arrest. Saldana's arguments on appeal are directed exclusively to overturning the jury's findings regarding the legality of the arrest.

We also note that Saldana originally brought both state and federal damage claims. However, the plaintiff never requested a jury instruction or finding on his state law claims, nor does he mention these claims in his appeal. We therefore assume that he has abandoned his state law causes of action.

from personal liability in § 1983 damage actions. Harlow v. Fitzgerald, ___U.S ___, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982); Dennis v. Sparks, 449 U.S. 24, 101 S. Ct. 183, 66 L.Ed.2d 185 (1980); Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978); Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).[12]

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12. It is by now well established that police officers are entitled to assert this "qualified immunity." E.g., Garris v. Rowland, 678 F.2d 1264, 1271 (5th Cir. 1982); Smith v. Gonzales, 670 F.2d 522 (5th Cir. 1982); Logan v. Shealy, 660 F.2d 1007, 1014 (4th Cir. 1981); Smiddy v. Varney, 655 F.2d 261 (9th Cir. 1981); Hunter v. Clardy, 558 F.2d 290, n.1 (5th Cir. 1977)

This "qualified" or "good-faith" immunity is an affirmative defense. Dennis v. Sparks, 449 U.S. 24, 29, 101 S.Ct. 183, 187, 66 L.Ed.2d 185 (1980); Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). Thus, it is the defendant who bears the burden of pleading his good faith[13] and establishing that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. Williams v. Treen, 671 F.2d 892, 897 (5th Cir. 1982); Barker v. Norman, 651 F.2d 1107, 1120 (5th Cir. 1981).

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13. Gomez v. Toledo, supra. We have repeatedly stated that a district court should not dismiss a § 1983 damage claim on grounds of qualified immunity unless this affirmative defense has been asserted by the defendant. See, e.g., Williams v. Treen, 671 F.2d 892, 896 n.6 (5th Cir. 1982) (dicta); Barker v. Norman, 651 F.2d 1107, 1120 (5th Cir. 1981) (dicta); Barrett v. Thomas, 649 F.2d 1193, 1201 (5th Cir. 1981)

[4] Once a defendant has asserted the affirmative defense of qualified immunity and has established that any allegedly tortious conduct was undertaken pursuant to the exercise of his discretionary authority, the burden then shifts to the plaintiff to rebut this "good faith" defense. Garris v. Rowland, 678 F.2d 1264, 1271 (5th Cir. 1982).[14] In order

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14. In Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980), it was held that § 1983 defendants bear the burden of pleading official immunity as an affirmative defense. However, "Gomez did not decide which party bore the burden of proof on the issue of good faith." Harlow v. Fitzgerald, ___U.S.___ 102 S.Ct. 2727, 2737 n.24, 73 L.Ed.2d___ (1982). In this Circuit, the rule is that a defendant official bears the burden of pleading good faith and establishing that any allegedly tortious acts were undertaken pursuant to the exercise of his discretionary authority, Williams v. Treen, supra at 896-897. However, once this has been done, "the burden [then] shifts to the plaintiff to breach the officials' immunity by showing that (continued of following page)

to breach the qualified immunity defense, the plaintiff must establish that a defendant's allegedly wrongful conduct violated clearly established law. Harlow v. Fitzgerald, ___U.S.___, 102 S.Ct.

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the official lacked good faith." Garris v. Rowland, supra at 1271; Rheaume v. Tex. Dept. of Public Safety, 666 F.2d 925, 930 (5th Cir. 1982); United Carolina Bank v. Board of Regents, 665 F.2d 553, 562 (5th Cir. 1982); Barker v. Norman, supra at 1121.

While the Fifth Circuit rule has not enjoyed universal acceptance, see e.g., Haislah v. Walton, 676 F.2d 208, 214-215 (6th Cir. 1982) (defendants bear burden of showing that they have acted in good faith); Wolfel v. Sanborn, 666 F.2d 1005, 1007 (6th Cir. 1982) (burden on defendant); Harris v. Roseburg, et al., 664 F.2d 1121, 1127 (9th Cir. 1981) (burden on defendent); Logan v. Shealy, 660 F.2d 1007, 1014 (4th Cir. 1981) (burden on defendant); DeVasto v. Faherty, 658 F.2d 859, 865 (1st Cir. 1981) (burden on defendant), this panel is bound by the rule that places the burden on breaching an asserted immunity upon the plaintiff.

2727, 2738-39, 73 L.Ed.2d 396 (1982).[15]

> "Government officials performing discretionary functions ... are shielded

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15. The Supreme Court's recent opinion in Harlow v. Fitzgerald, supra, has wrought a quiet revolution in the law of official immunities. Prior to that decision, it had been consistently held that the "good faith" immunity defense had both "objective" and "subjective" aspects -- the oft-cited "two prong" standard. See, e.g., Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978); Wood v. Strickland, 420 U.S. 308 320-22, 95 S.Ct. 992, 999-1001, 43 L.Ed. 2d 214 (1975); Garris v. Rowland, supra at 1271-1272. Williams v. Treen, supra at 896; Rheaume v. Tex. Dept. of Public Safety, supra at 930; United Carolina Bank v. Board of Regents, supra at 562 (5th Cir. 1982); Barker V. Norman, supra at 1125-1127; Bogard v. Cook, 586 F.2d 399, 411 (5th Cir. 1978); Bryan v. Jones, 530 F.2d 1210, 1214 (5th Cir. 1976) (en banc). Thus, prior to Harlow, there were two avenues open to the § 1983 plaintiff who sought to rebut the qualified immunity defense; he could either allege that the defendant official had acted with subjective malice or that the defendant had acted in violation of clearly established law. Williams v. Treen, supra at 896. In Harlow, however, the Supreme Court "adjusted" the qualified immunity standard established by its earlier decisions and dispensed with the "subjective" test

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> from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights."
> Id. 102 S.Ct.at 2738.

Thus, unless a § 1983 plaintiff can establish that the defendant official has violated clearly settled law, his damage action must be dismissed. Id.[16]

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of official good faith. Harlow v. Fitzgerald, supra 102 S.Ct. at 2737-2739. In light of Harlow, the good faith of official defendants is now to be tested purely by an "objective" standard; "government officials performing discretionary functions generally are shielded from liability for civil damages inscfar as their conduct does not violate clearly established statutory or constitutional rights." Harlow v. Fitzgerald, supra 102 S.Ct. at 2738-39.

16. Harlow v. Fitzgerald, supra, involved the qualified immunity of federal officials sued in "Bivens" type damage actions. However, the Harlow Court expressly stated
(Continued on following page)

It is undisputed that the defendants in this case were acting pursuant to their discretionary authority when they arrested Jose Saldana.[17] Moreover, there is no question but that these defendants asserted their affirmative defense of qualified immunity.[18] Once the defendants asserted and established their entitlement to a qualified immunity, the burden of proof and persuasion on this issue shifted to the plaintiff,

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that the same qualified immunity standard would apply in suits brought against state officials under § 1983. Id. 102 S.Ct. at 2738-39 n.30.

17. It was never suggested that the defendants' actions were "...so far removed from the ordinary course of [their] duties ... that [they could not] establish their entitlement to claim immunity in the first instance." Barker v. Norman 651 F.2d 1107, 1121 n.18.

18. See, note 10.

see note 14. It became Jose Saldana's burden to breach the defendants' good-faith immunity. Id. To recover monetary damages, Saldana was required to show that the defendants had violated clearly established law, see note 15.

[5] We have carefully reviewed the briefs and record and find that the plaintiff-appellant offered only one argument in support of his crucial claim that the defendants' conduct had violated "clearly established" law. Specifically, Saldana suggested that Officers Garza and Olvera were not entitled to a qualified immunity because "the Texas statutory provisions granting authority to arrest someone for public intoxication and disorderly conduct by abusive language were enacted many years ago and represent well-settled statutory law."

Appelants' Brief at 42.[19] In essence, Saldana argued that because he was not violating laws that were "clearly-settled," Officers Garza and Olvera must have violated "clearly-settled" law in making the arrest.

We find the appellant's syllogism to be flawed. He would have us hold that whenever a police officer makes an arrest for "public intoxication" or "disturbing the peace," and it is later determined that the accused was not committing these offenses as defined by statute, the arresting officer's conduct would constitute a violation of clearly established law. Certainly this cannot be the rule. As Chief Judge Clark has recently stated:

> The Constitution does not guarantee that only the guilty will be

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19. This is the only argument regarding qualified immunity that was made in the trial court. See Plaintiff's Motion for j.N.O.V. at ¶ 19.

> arested. If it did, section 1983 would provide a cause of action for every defendant acquitted -- indeed for every suspect released. Smith v. Gonzales, 670 F.2d 522, 526 (5th Cir. 1982).

[6] The mere fact that a person is wrongfully arrested and charged with an offense whose elements are well-settled does not mean that the arrest itself contravenes "well-settled law." See, e.g., Garris v. Rowland, supra (officer acting without probable cause arrests plaintiff and charges him with child molestation; nevertheless, defendant is cloaked by qualified immunity). Rather, it is clear that a police officer may be immune from liability under § 1983 even if it is later determined that probable cause for an arrest did not exist. Id.

We could assume arguendo that Saldana was standing on the "private" side of the property line at the time of his arrest and that he therefore did not commit the offense of public intoxication. Similarly, we could assume that whatever Saldana said to Officer Garza constituted constitutionally "protected speech" and could not serve as the basis for a conviction under the Texas "abusive language" statute. Simply stated, we could assume that the arrest was illegal and unsupported by probable cause. However, even if all the plaintiff-appellant has said regarding the illegality of his arrest is true, we could still find that the arresting officers enjoy a qualified immunity from personal liability. Garris v. Rowland, supra at 1271; Harris v. Pirch, 677 F.2d 681, 686-689 (8th Cir. 1982)(although plaintiff

established prima facie § 1983 case, defendant is cloaked by a qualified immunity); Rheaume v. Texas Department of Public Safety, supra at 931 (not necessary to determine if plaintiff established prima facie case since defendant is protected by qualified immunity); cf. Reeves v. City of Jackson, Miss., 608 F.2d 644 at 652 n.3 (5th Cir. 1979) (dicta).

In this case the plaintiff contended that he was arrested without probable cause because he had not committed the offenses with which he had been charged. He supported this contention with elaborate arguments regarding the constitutionality of local sound ordinances and abusive speech statutes, supplemented by an extended discourse upon Texas "public-place" jurisprudence. Saldana has argued that the defendants should have known that on the

facts of this case an arrest was not justified. We just cannot agree.

Police officers can be expected to have a modicum of knowledge regarding the fundamental rights of citizens. Lawlessness will not be allowed to pervade our constabularies. However, in holding our law enforcement personnel to an objective standard of behavior, our judgment must be tempered with reason. If we are to measure official action against an objective standard, it must be a standard which speaks to what a reasonable officer should or should not know about the law he is enforcing and the methodology of effecting its enforcement. Certainly we cannot expect our police officers to carry surveying equipment and a Decennial Digest on patrol; they cannot be held to a title-searcher's knowledge of metes and bounds or a legal scholar's expertise in

bounds or legal scholar's expertise in in constitutional law.

In order to impose personal liability upon these individual police officers, the plaintiff was not only required to show that this arrest was illegal; it was necessary that he show that the arrest was so illegal as to violate clearly established law. In this case and on these facts, we do not think that the palintiff carried his burden.[20]

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20. In reaching our decision, we have applied the qualified immunity standard set forth in the recently published Harlow v. Fitzgerald, supra. See note 16. However, we note that in the case now before us, the plaintiff introduced no evidence that could support a finding that these police officers acted with personal malice. Thus, even under the pre-Harlow "two-pronged" qualified immunity standard (defendant must act in both objective and subjective good faith in order to enjoy protections of immunity), these defendants would be entitled to a dismissal as a matter of law. (Continued on next page)

V. CONCLUSION

[7] It goes without saying that a plaintiff who seeks to collect damages for an allegedly illegal arrest must prove that the arrest was indeed illegal. However, establishing the illegality of the arrest will not necessarily entitle the plaintiff to a recovery. If the arresting officers have asserted and established their entitlement to a "good-faith" immunity, the plaintiff bears an additional burden; he must rebut the asserted

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We also emphasize that while the Harlow standard may have the effect of broadening the scope of the qualified immunity defense, it certainly does not give police officers absolute immunity from civil damages liability. Certainly, egregious police misconduct will continue to give rise to personal liability. See, e.g., Howard v. Gonzales, 658 F.2d 352 (5th Cir. 1982). All we hold today is that these defendants properly asserted their qualified immunity and this plaintiff

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defense. If he does not rebut the defense, he cannot recover -- even if he has been the victim of a demonstrably illegal arrest.

We recognize "that courts should be even-handed in their dispensation of justice regardless of rank, badges, or insignia of offense." Williams v. Treen, supra at 903. Therefore, it is important to emphasize that the qualified immunity defense "is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." Barr v. Matteo, 360 U.S. 564, 572-73, 79 S.Ct., 1335, 1340-41, 3 L.Ed.2d 1434 (1959).

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failed to rebut the defense by showing that the defendants had acted in violation of what they knew or should have known to be clearly established law.

"The underlying policy which pervades every qualified immunity analysis is one of protecting the public by permitting its decision-makers to function without fear that an exercise of discretion might in retrospect be found to be error." Cruz v. Beto, 603 F.2d 1178, 1183 (5th Cir. 1979)

In concluding that qualified immunity is applicable to this case, we must remind ourselves that such immunity should neither be gratuitously nor parsimoniously applied. Perhaps Mr. Saldana's arrest was based upon probable cause; perhaps it was not. However, in this case "we need not decide ... [Saldana's] constitutional claims, because [the defendants']

qualified immunity defense would have been an appropriate basis for the district court's decision." Rheaume v. Texas Department of Public Safety, 666 F.2d 925, 931 (5th Cir. 1982)

Accordingly, the judgments dismissing the plaintiff's claims against Officers Garza and Olvera are

AFFIRMED.

On Petition for Rehearing

October 6, 1982

Before Brown, Goldberg, Politz
Circuit Judges

Per Curiam

It is ordered that the petition for rehearing filed in the above-entitled and numbered case be and the same is hereby denied.

Entered for the Court:

s/John R. Brown
U.S. Circuit Judge

Office-Supreme Court, U
FILED
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ALEXANDER L. STEVAS
CLERK

No. 82-1132

In the Supreme Court of the United States

October Term, 1982

JOSE SALDANA, *Petitioner,*

vs.

ANTONIO GARZA AND RICARDO OLVERA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner states the Questions for Review.

LIST OF PARTIES

Jose Saldana
Antonio Garza
Ricardo Olvera

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No. 82-1132

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OPINIONS BELOW

The Opinions Below are included in the Appendix to Petitioner's Petition for Certiorari. In addition, the Opinion of the Fifth Circuit Court of Appeals is also published as *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982).

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1254(1). The fourth issue presented by Petitioner, however, was not raised or addressed by the Court below. This Court has no jurisdiction to consider that issue.

STATUTES INVOLVED

The Petitioner sets forth the statutes involved with the exception of:

Texas Penal Code:

Sec. 42.01 Disorderly Conduct

(a) A person commits an offense if he intentionally or knowingly:

(5) Makes unreasonable noise in a public place or in or near a private residence that he has no right to occupy.

STATEMENT OF THE CASE

On or about Sunday, February 15, 1976, during the late evening hours, in response to a call complaining of loud music, McAllen Police Officers Reymundo Sanchez and J. J. Lopez were dispatched to a residence in McAllen, Texas. The officers found Petitioner, Jose Saldana, and other men playing loud music and drinking. Petitioner and the others were told by the police officers to turn down the volume of the music and to stay off the street and on their property. The volume of the music was lowered, and the police officers departed. (Tr. pp. 303-306, 312).[1]

Thereafter, while on routine patrol, Respondent Officers Garza and Olvera heard loud music and yelling. The disturbance was audible at a distance of one and one-half blocks from the location of the officers, and the time of day was 11:00 o'clock p.m. The officers decided to investigate. (Tr. pp. 135, 215, 270). Respondents did

1. Tr. refers to the transcript of the trial proceedings.

not intend to arrest the individuals causing the disturbance. They merely intended to request that the music be turned down. (Tr. p. 135).

At the time Respondents arrived at the scene of Petitioner's home, Petitioner admitted to having consumed four to five beers at the scene. He also admitted drinking beer earlier in the day. (Tr. pp. 92, 97, 98). The Petitioner was upset and angry. (Tr. p. 47). When confronted by Respondents regarding the loud music, Petitioner became argumentative and belligerent. Respondents found Petitioner to be intoxicated, off balance, unsteady on his feet, and in a public place; to-wit: the street and right of way in front of his home. (Tr. pp. 163, 217, 220, 221, 259, 273, 279, 280).[2]

Respondents determined that Petitioner was, because of his intoxicated and boisterous state, a danger not only to himself, but to others. They feared that he could have been hit by cars driving on the street, that he could have caused or been involved in altercations with the neighbors, or that he could have gotten into his car and driven off in a reckless manner. (Tr. pp. 220, 280, 281). Simultaneously, Respondents heard Petitioner use vulgar and abusive language, while in a public place. The vulgar and abusive language was directed at the officers. (Tr. pp. 272, 274, 294).

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2. The jury found that Petitioner was in a public place even though Petitioner continues to claim, even at this level, that he was on private property. The jury's finding of a lawful arrest can only mean that the Petitioner was on public property, especially when one considers the trial judge's instruction: "You will notice that underlying this matter we make reference to 'public place' several times. There is evidence that it was out in the street. There is evidence that it was not out in the street. That is something that you are going to have to determine, not us, because it is your province." (p. 15, Reporter's Supplemental Transcript of Proceedings).

Petitioner was arrested by Respondent Garza and charged with public intoxication and disorderly conduct by abusive language. During the course of the arrest, there was a minor struggle between Petitioner and Respondent Garza. (Tr. p. 221).

At the close of evidence in the trial court, both sides requested a directed verdict. The District Court found that there was insufficient evidence to submit any issues to the jury regarding the conduct of Respondent Olvera. The conduct of Respondent Garza was submitted to the jury, and the jury returned its verdict finding that the arrest was lawful and further finding that there was no excessive force used in making the arrest. The trial court entered a judgment that Petitioner take nothing, and he appealed.

The Fifth Circuit Court of Appeals affirmed the judgment of the trial court, concluding that Respondents were entitled to good faith immunity for their actions.

ARGUMENT

Reasons Why The Writ Should Be Denied

I.

The Panel Has Not Created A New Defense In Conflict With Pierson v. Ray.

No Writ of *Certiorari* is necessary because the Fifth Circuit Panel has not created any new defenses; nor has it done violence to the doctrine set out in *Pierson v. Ray*, 386 U.S. 547 (1967). It is not disputed that *Pierson v. Ray* speaks in terms of "good faith and probable cause". However, the Court could not have meant probable cause in the constitutional sense. This has been recognized since the Second Circuit's Opinion in *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339 (2d Cir. 1972).

To make an individual police officer liable in damages for an arrest made in good faith; but without probable cause, as later found by a court, would be tantamount to making the police officer a guarantor of the rights of those arrested. This is especially true when one considers that the municipality that hires the officer has no liability under respondeat superior. The trial judge who, after the fact, determines the nonexistence of probable cause is absolutely immune from liability.[3]

An individual officer confronted with a situation at 11:00 o'clock p.m. on the streets of McAllen, Texas, does not have the burden to determine probable cause in its constitutional sense. *Pierson* and its progeny do not stand for the proposition that an officer must make a constitutional determination, equal in scope to that made by a

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3. See Nahmod, *Civil Rights and Civil Liberties Litigation*, pp. 248-258 (1979).

learned trial judge only after presentation of evidence and review of statutes. To follow Petitioner's interpretation would hamstring law enforcement.

The defense of "good faith and probable cause" and "good faith or probable cause" is of no moment regarding the results of the litigation between the parties involved. There was no evidence regarding bad faith or personal malice. The jury was duly instructed regarding probable cause. (Reporter's Supplemental Transcript of Proceedings pp. 13, 14). Implicit in the jury's finding was a finding that officers acted with probable cause. See *Saldana v. Garza*, 684 F.2d 1159, Footnote 20. Therefore, the granting of *certiorari* in this case could not have any bearing on the rights of Petitioner since Respondents have met all possible burdens.

II.

The Panel Below Was Correct In Its Determination Of Burden Of Persuasion.

This Court in *Harlow v. Fitzgerald*, ... U.S. ....., 102 S.Ct. 2727, carefully weighed the factors previously involved in the assertion of qualified immunity. The Court weighed the subjective elements of the good faith defense on the one hand against the admonition in *Butz v. Economou*, 488 U.S. 478 (1978), on the other. The *Butz* admonition was that insubstantial claims should not proceed to trial. In *Harlow*, the Court said:

> "In the context of *Butz's* attempted balancing of competing values, it is now clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of

able people from public service. *Harlow v. Fitzgerald*, 102 S.Ct. 2727, at 2738."

This Court decided in balancing that the costs, distractions and inhibitions of the subjective good faith defense should be avoided and that henceforth ". . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. (Citations omitted).

The Panel of the Fifth Circuit has not done away with the burden placed upon defendants wishing to claim the qualified immunity defense. The Court clearly stated: "Thus, it is the Defendant who bears the burden of pleading his good faith and establishing that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." (Footnote and Citations omitted, *Saldana v. Garza*, p. 1163).

Only after a defendant has met the burden required of it by *Harlow* and the Fifth Circuit in *Saldana v. Garza* does the duty to go forward shift to the plaintiff to prove objectively that the wrongful conduct violated clearly established law. *Harlow*, after balancing, decided to save the government official the costs, distractions and inhibitions surrounding litigation of insubstantial claims. It is illogical to now impose upon government officials that burden which *Harlow* sought to relieve.

The burden to establish whether a law was, or was not, clearly established at the time of an alleged wrong is not overpowering. If a plaintiff objectively proves that a defendant's conduct violates a law that was clearly established, he has solved his immunity defense problems unless the government official can claim extraordinary circumstances. *Harlow* clearly places the burden upon the

government official if, in the face of violating a clearly established law he chooses to prove that because of extraordinary circumstances, he neither knew nor should have known of the clearly established law. *Harlow v. Fitzgerald*, 2739.

III.

The Panel Below Correctly Allocated The Persuasion Burden And Properly Applied Qualified Immunity To The Police Officers.

Nowhere in the litigation generated by the events of February 15, 1976, has it been suggested that the police officers involved were not acting in their official capacities as law enforcement officers. It is equally clear that the Petitioner was arrested pursuant to Sections 42.01 (a)(1), 42.01(a)(5) and 42.08 of the Texas Penal Code. (Tr. pp. 172, 274, 294). A police officer is authorized to make a warrantless arrest for violation of Section 42.01 of the Texas Penal Code. *Brown v. State*, 594 S.W.2d 86, 87 (Tex. Cr. App. 1980). It is immaterial whether the Petitioner was charged with or tried for all of the violations he committed. *Michigan v. DeFillippo*, 443 U.S. 31 (1979). Likewise, it is immaterial whether the Petitioner was acquitted of the charges he was arrested for. The constitution makes no guarantee that only the guilty will be arrested. *Baker v. McCollan*, 433 U.S. 137 (1979).

Petitioners, therefore, conclusively showed that they were governmental officials, performing discretionary functions and that their conduct did not violate clearly established statutory or constitutional rights. Petitioners clearly met the burden in *Harlow v. Fitzgerald*. Not only did they meet the burden in *Harlow v. Fitzgerald*, they met the burden in all qualified immunity cases decided prior to *Harlow* since the jury found in favor of the Defendants.

The jury's finding established the subjective good faith that *Harlow* obviated.

Petitioners claim that the qualified immunity discussed in *Harlow v. Fitzgerald* is somehow different from the qualified immunity pertaining to a "good faith" defense and, therefore, is not available to "lower-ranking" people such as police officers. Such an allegation is clearly not the status of the law. A police officer's inclusion among those entitled to qualified immunity was specifically pointed out in *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974). Additionally, there are numerous cases and precedents allowing the defense of qualified immunity to various "low-ranking" officials within governmental framework. Police officers have consistently been entitled to such a defense: *Procunier v. Navarette*, 434 U.S. 555 (1978); *Logan v. Shealy*, 600 F.2d 1007 (4th Cir. 1981); *Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981); *Smith v. Gonzales*, 670 F.2d 522 (5th Cir. 1982); *Haislah v. Walton*, 676 F.2d 208 (6th Cir. 1982); *Wolfel v. Sanborn*, 666 F.2d 1005 (6th Cir. 1982); *Landrum v. Moats*, 576 F.2d 1320 (8th Cir. 1978); *Harris v. City of Roseburg*, 664 F.2d 1121 (9th Cir. 1981); and *Martin v. Duffie*, 463 F.2d 464 (10th Cir. 1972). Additionally, jailers and correction officers have been held entitled to qualified immunity: *Devasto v. Faherty*, 658 F.2d 859 (1st Cir. 1981); *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976); and *Reeves v. City of Jackson, Mississippi*, 608 F.2d 644 (5th Cir. 1979). Sheriffs and their deputies have been afforded qualified immunity in *Harris v. Pirch*, 667 F.2d 681 (8th Cir. 1982) and *State of Missouri v. Fidelity & Deposit Company*, 179 F.2d 327 (8th Cir. 1950). High-ranking school officials, *Wood v. Strickland*, 420 U.S. 76 (1975), *United Carolina Bank v. Board of Regents*, 665 F.2d 553 (5th Cir. 1982); high-ranking prison officials, *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978), *Cruz v. Beto*, 603 F.2d 1178 (5th Cir. 1979), and police superintendents,

Gomez v. Toledo, 446 U.S. 633 (1980) have all been afforded the immunity. Therefore, Petitioner's allegations are without merit and certiorari need not be granted on these points.

IV.

This Court Is Without Jurisdiction To Consider Petitioner's Claim For The Extension Of Municipal Liability.

It is Petitioner's burden to establish that the substance of his claim has in the first instance been presented to the Court below. *Picard v. Connor*, 404 U.S. 270, 275-278 (1971). The cases are so numerous that it is clear that this Court cannot decide issues raised for the first time on Petition for Writ of Certiorari or on appeal and that the Court will not decide federal questions not raised and decided in the Court below. *Tracon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

Nowhere in the trial below, nor the appeal to the Fifth Circuit Panel, has Petitioner ever raised this issue. In view of his failure to raise this issue, the application for certiorari should be denied for want of jurisdiction. *Cardinale v. Louisiana*, supra, 439.

This Court in its landmark decision of *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978) held that ". . . Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tort-feasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." Id., 691. Every case following *Monell* has adhered to the Court's reasoning, and Petitioner has showed no reason for holding otherwise.

CONCLUSION

For the above reasons, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, B. Buck Pettitt, a member of the Bar of the Supreme Court of the United States and counsel of record for Antonio Garza and Ricardo Olvera, hereby certify that on February 1, 1983, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Reply of Respondents to Petition for Writ of Certiorari on Mr. James C. Harrington, American Civil Liberties Union Foundation—South Texas Project, 303 West Park Avenue, Pharr, Texas 78577.

All parties required to be served have been served.

DATED the 1st day of February, 1983.

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